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No. 95-1693

In the Supreme Court of the United States

OCTOBER TERM, 1995

VICTOR PORTILLO AND RANCHO SIERRA CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the Due Process Clause and Fed. R. Civ. P. 37 permitted the district court to strike petitioners' answers and to enter default judgments in civil forfeiture proceedings against properties claimed by petitioners as a sanction for petitioners' repeated willful failure to comply with the discovery orders of the court.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 76 F.3d 390 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1996. Pet. App. 2a. The petition for a writ of certiorari was filed on April 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After petitioners' willful and repeated failures to comply with discovery orders in civil forfeiture proceedings in which petitioners appeared as claimants,

the United States District Court for the Central District of California, acting under Fed. R. Civ. P. 37, struck petitioners' answers to the forfeiture complaints and entered default judgments against the properties. The court of appeals affirmed. Pet. App. 2a-3a.

1. It has been a matter of public record since April 2, 1993, that the Federal Bureau of Investigation believes that petitioner Portillo has been involved in laundering drug proceeds. According to Henry Cleveland, formerly an "officer" in petitioner Rancho Sierra Corporation, Portillo was a drug trafficker who established Rancho Sierra for the purpose of laundering his drug money through the purchase of real estate. Portillo provided all the money to buy, subdivide, and develop the real estate and made all the decisions regarding which properties to purchase and how much to pay. Portillo, who resides in Mexico, has been aware since at least March 1993 that the FBI has been investigating him and he has avoided apprehension by law enforcement authorities. Gov't C.A. Br. 4-5.

On April 12, May 14, and October 5, 1993, the government filed civil forfeiture actions against certain real property located at Rialto Acres (Rialto), a vacant lot located between Mango Street and Sierra Avenue (Mango), and a residence located at 8946 Catawba Avenue (Catawba), all located in Fontana, California. The complaints, brought pursuant to 18 U.S.C. 981, alleged that the petitioners' properties were forfeitable because they constituted or were derived from proceeds of money laundering activity, in violation of 31 U.S.C. 5324 (structuring to evade cash transaction reporting requirements). The three complaints were consolidated. Petitioners Portillo

and Rancho Sierra filed claims to the properties and answers to the complaints. See Gov't C.A. Br. 1-2.

On December 3, 1993, the government in all three cases noticed the depositions of (1) Portillo, (2) the designated authorized representative of Rancho Sierra, and (3) the custodian of records for Rancho Sierra. The depositions were noticed for January 4, 1994. Petitioners moved for a protective order seeking a two-month postponement of the depositions to give them more time to prepare. The district court granted a continuance until March 4, 1994, a date later changed, at petitioners' request, to March 1, 1994. On March 1, 1994, Rancho Sierra's designated representative and records' custodian, attorney Marc Eagan, appeared and produced documents showing that Portillo was the sole shareholder and alter ego of Rancho Sierra. Portillo himself, however, failed to appear. His attorney stated on the deposition record that Portillo voluntarily chose not appear, that he was not ill, and that he had not been involved in any accident. See Gov't C.A. Br. 2, 5-6 & n.3.

On March 14, 1994, the government moved to strike the claims and answers of petitioners in all three cases because of Portillo's failure to appear for his deposition. Petitioners responded by moving for a protective order seeking to have Portillo's deposition taken in Mexico or telephonically; petitioners alleged that Portillo feared that his life would be threatened if he travelled to the United States.[1] The court

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[1] Portillo did not present any credible evidence of the basis of his alleged "fear." His motion referred in vague terms to an exhibit concerning firearms silencers; that exhibit, however, was not attached to his motion. The motion did attach an undated and unauthenticated transcript of a conversation in which cooperating witness Henry Cleveland purportedly

declined to enter default judgment at that time, and it denied petitioners' motion for a protective order. On April 11, 1994, the court ordered Portillo to appear for his deposition in Los Angeles, California within 30 days (*i.e.*, by May 11), and warned petitioners that Portillo's non-appearance would result in the entry of default judgment. Portillo then requested another delay, alleging that his mother was ill. On April 25, 1994, the district court granted Portillo additional time; it ordered that the deposition be held in Los Angeles on June 2, 1994. See Gov't C.A. Br. 2-3, 6-7.

On May 10, 1994, petitioners filed a motion for summary judgment, together with a new motion for a protective order to prevent the taking of Portillo's deposition until after the motion for summary judgment was decided. On May 31, 1994, the district court denied petitioners' new motion for a protective order, ordered that the deposition proceed on June 2 as previously ordered, and postponed the hearing on petitioners' summary judgment motion. On May 31, after the district court's adverse ruling, petitioners' counsel advised counsel for the government that Portillo had no intention of appearing for the June 2 deposition; as the sole basis for Portillo's refusal to attend, petitioners' counsel cited Portillo's fear that he might be arrested if he appeared. Portillo once again failed to appear for his deposition on June 2. For the first time, he alleged that his non-attendance was due to illness. Gov't C.A. Br. 7-8.

After the government advised the district court that Portillo had once again failed to appear at his

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described someone as a "jerk." The transcript did not in any way identify the person to whom Cleveland was referring. See Gov't C.A. Br. 7 n.4.

court-ordered deposition, the court took petitioners' summary judgment motion off the calendar. On July 21, 1994, the court issued orders striking each of petitioners' answers to the forfeiture complaints. On July 22, 1994, it entered judgment of forfeiture in the Mango case, and on July 25, 1994, it entered judgments of forfeiture in the Rialto and Catawba cases. Gov't C.A. Br. 8.

2. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 2a-3a. The court applied *Wanderer* v. *Johnston*, 910 F.2d 652 (9th Cir. 1990), which delineated five factors that must be considered before entering a default judgment as a sanction for noncompliance with discovery orders under Fed. R. Civ. P. 37. The five *Wanderer* factors are: (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its docket, (3) the risk of prejudice to the party seeking sanctions, (4) the public policy seeking disposition of cases on their merits, and (5) the availability of less drastic sanctions. See Pet. App. 3a (citing *Wanderer*, 910 F.2d at 656). The court concluded that all the *Wanderer* factors, with the exception of the fourth (disposition of cases on their merits), weighed in favor of dismissal. Pet. App. 3a.

After an independent review of the record, the court of appeals also found that it was "quite clear" that Portillo "never intended to appear for a deposition." Pet. App. 3a. The court noted that "[t]he requisite willfulness is apparent," *ibid.*, and it rejected "the implication in [petitioners'] briefs" that "the government * * * agreed that the case would be decided on the basis of the facts alleged in the forfeiture petition, or that discovery was unnecessary." *Ibid.*

ARGUMENT

Petitioners contend that the entry of default judgments on the basis of discovery abuse contravenes the Due Process Clause of the Fifth Amendment and departs from the course of decisions applying Fed. R. Civ. P. 37 in the lower courts. Pet. 9-10. In the alternative, petitioners suggest that the petition should be held pending this Court's resolution of the due process claims raised in *Degen* v. *United States*, No. 95-173. See Pet. 10, 16-17. Because petitioners did not make any due process argument in the court of appeals, and the court of appeals did not address any due process issue, their constitutional claim is not properly before this Court. *Gray* v. *Netherland*, No. 95-6510 (June 20, 1996), slip op. 12; see also, *e.g.*, *Citizens Bank of Maryland* v. *Strumpf*, 116 S. Ct. 286, 290 n.** (1995); *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1605 n.5 (1994).[2] Moreover, since the filing of the petition this Court decided *Degen*; nothing in that decision casts any doubt on the legal analysis employed by the court of appeals. Finally, there is no conflict between the unpublished decision of the court of appeals in this case and the decisions of other courts of appeals. Accordingly, further review is not warranted.

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[2] For the same reason, petitioners' passing suggestion (Pet. 7-8) that it was error for the district court not to "distinguish between Rancho Sierra and Portillo" in imposing sanctions is not properly before this Court. The case was litigated in district court on the assumption that that court could properly treat Rancho Sierra as Portillo's alter ego. Petitioners' joint brief in the court of appeals did not contain any suggestion, much less a claim, that the district court erred in proceeding in that fashion.

1. In *Degen*, the Court held that federal courts may not invoke their "inherent authority" to "disentitle" a property owner from filing a claim and answer in a civil forfeiture proceeding on the ground that he is a "fugitive from justice" in a related criminal case. See *Degen* v. *United States*, No. 95-173 (June 10, 1996), slip op. 3-9. The judgments entered against petitioners were not based on any exercise of "inherent authority," on any theory that Portillo was a "fugitive from justice," or, as petitioners allege, on Portillo's mere "inaction" (Pet. 16) in declining to travel to the United States from a foreign country to litigate his claim in person. As permitted by Rule 37, those judgments were based instead on Portillo's repeated and willful noncompliance with the valid discovery orders of the district court.

Far from casting any doubt on the lower courts' application of Rule 37, *Degen* expressly reaffirmed the district court's traditional authority to sanction absent forfeiture claimants on the basis of discovery abuse in the civil forfeiture proceeding itself—including (slip op. 7) in "the discretion of the district court" the sanction of "dismissal in an appropriate case" (*ibid.*):

> [O]f course, Degen's absence entitles him to no advantage. If his unwillingness to appear in person results in non-compliance with a legitimate order of the court respecting pleading, discovery, the presentation of evidence, or other matters, he will be exposed to the same sanctions as any other uncooperative party. A federal court has at its disposal an array of means to enforce its orders, including dismissal in an appropriate case. Again, its powers include those furnished

> by federal rule, see, *e.g.*, Fed. Rules Civ. Proc. 37, 41(b); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam); *Societe Internationale pour Participations Industrielles et Commerciales* v. *Rogers*, 357 U.S. 197, 212 (1958); cf. *United States* v. *Pole No. 3172*, 852 F.2d 636, 641-642 (CA1 1988), and by inherent authority, see, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. [32,] 44-45 [(1991]; *Link* v. *Wabash R. Co.*, 370 U.S. [626,] 630-633 [(1962)]; *Woodson* v. *Surgitek, Inc.*, 57 F.3d 1406, 1416-1417 (CA5 1995); *Zebrowski* v. *Hanna*, 973 F.2d 1001, 1006 (CA1 1992) (Breyer, C.J.).

Ibid.

The entry of judgment in favor of the government was consistent with the precedents cited with approval by this Court. As required by *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), and *Societe Internationale Pour Participations Industrielles et Commerciales* v. *Rogers*, 357 U.S. 197 (1958), the court of appeals, after an independent review of the record, found that petitioner Portillo's failures to appear were willful. Indeed, "the record * * * makes it quite clear that he never intended to appear for a deposition." Pet. App. 3a. Petitioner Portillo was given multiple opportunities to appear in accordance with the court's order, and petitioners were warned that Portillo's non-attendance would result in the entry of default judgment. Portillo nonetheless willfully flouted the court's authority. He failed on two separate occasions to appear as ordered by the court, and he responded to the court's attempt to manage its docket in an orderly fashion with a pattern of transparently

pretextual excuses for his unavailability. In such circumstances, as this Court has made clear, "the most severe in the spectrum of sanctions * * * must be available to the district court * * *, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League*, 427 U.S. at 643.

To evade the consequences of willful non-compliance with discovery orders, petitioners filed a summary judgment motion claiming that the case could be resolved without discovery. The court of appeals held, however, that it had not been established that discovery was unnecessary. Moreover, it was plain from the record that the filing of that summary judgment motion was not a good faith response to the forfeiture complaint, but instead was another bad faith attempt to evade Portillo's duty to appear at the deposition. The summary judgment motion was not filed until petitioner Portillo had delayed, on grounds other than relevance, the initial deposition date and had unaccountably failed to appear, as ordered, at the March 1, 1994, deposition. The district court directed petitioner Portillo to appear on pain of the sanction of striking petitioners' pleadings, and granted him another postponement on grounds other than relevancy. It was only at that point, in an attempt to evade compliance with the district court's order, that petitioners filed a summary judgment motion that conceded, solely "[f]or purposes of [that] motion" (Pet. 5), the legal sufficiency of the government's threshold showing. In that context, the district court permissibly exercised its discretion to require Portillo's attendance at the deposition before consideration of his new motion. That procedural arrangement of the

proceedings was not an abuse of the court's discretion.

2. Petitioners also claim (Pet. 10-15) that imposition of the sanction in this case conflicts with the Rule 37 decisions of this Court and other courts of appeals. There is no conflict.

Petitioners argue that *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909), establishes a proposition that "a court may render judgment as a discovery sanction only when the discovery sought is likely to shed light upon the claims at issue in the aspect of the litigation in which the sanction is imposed." Pet. 11-12. *Hammond Packing* involved the refusal of a party to comply with an order to provide witnesses and produce documents relevant to its defenses. In that context, the Court approved the sanction of dismissal on the theory that the refusal to produce evidence relevant to the defenses could be taken as "an admission of the want of merit in the asserted defense[s]." 212 U.S. at 351. A comparable nexus exists in this case, where the government sought discovery relevant to its own claim that petitioners' properties were forfeitable in their entirety and petitioner Portillo wilfully refused to comply with a valid discovery order. That act may be taken as an admission of facts that the government sought to discover in the deposition of petitioner, including complete substantiation for its claim to forfeiture of the entirety of the properties.

Contrary to petitioners' assertion (Pet. 12-13), the decision below does not conflict with the First Circuit's decision in *United States* v. *Pole No. 3172*, 852 F.2d 636 (1st Cir. 1988). That case disapproved of the sanction of dismissal for a party's failure to appear at his deposition where "[t]here [was] no

indication that he [was] still alive, let alone that he kn[ew] anything at all about this litigation." 852 F.2d at 641. For that reason, the First Circuit concluded that the record failed to support a finding of willfulness or bad faith by the defaulting party, as required by *National Hockey League*, *supra*, and *Societe Internationale*, *supra*. 852 F.2d at 641-642. Indeed, the First Circuit expressly distinguished (*id.* at 642) cases in which it is "clear that [a party] himself decided, after learning of his discovery obligations, not to appear."

There is no greater merit in petitioners' reliance (Pet. 13) on *Fonseca* v. *Regan*, 734 F.2d 944 (2d Cir.), cert. denied, 469 U.S. 882 (1984). In *Fonseca*, the Second Circuit concluded that the discovery orders at issue were not valid because the information was irrelevant to the legal issue presented in the case. 734 F.2d at 948-949. The court of appeals stated that "where the information sought is not properly discoverable, it is axiomatic that a district court should not impose a Rule 37 sanction for a party's failure to comply with an order to reveal such information." *Id.* at 948. Here, by contrast, the court of appeals agreed that the order to take Portillo's deposition was proper in the context of the legal issues presented in this case. It is true that petitioners chose, for tactical reasons, to concede "*arguendo*" (Pet. 3) the sufficiency of the government's complaint solely for purposes of their Eighth Amendment claim, but that contingent concession did not place the district court under any legal obligation to consider that claim immediately, much less did it render legally "irrelevant" to the proper disposition of the case the information sought by the government's discovery requests. That petitioners hoped that their contingent

concession would bring them victory without the need for further discovery did not obligate the government and the district court to proceed on the same assumption—and to conduct the litigation as if the only issues properly raised by the case as a whole were those pertinent to petitioners' Eighth Amendment motion.[3]

Nor are petitioners correct in asserting (Pet. 13-14) that the decision below conflicts with *Harris* v. *City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995). In that case, the Third Circuit held that documents that the City of Philadelphia had failed to produce did not have a sufficient connection with the merits of the pleading that was dismissed as a sanction for nonproduction. 47 F.3d at 1331. Moreover, since the dismissed pleading was the City's own motion to modify an extant injunction, the City could be

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[3] Nor is it "clear," as petitioners assert, that no discovery would be required to resolve the supposedly "purely legal issues" of whether the forfeitures would violate the Eighth Amendment's prohibition against excessive fines. Pet. 14-15. Under Ninth Circuit law, that inquiry entails a "two-pronged approach": (i) an "instrumentality" or "nexus" test, and (ii) an examination of the relationship between "the value of the property" and the "culpability of the owner." *United States* v. *$69,292.00*, 62 F.3d 1161, 1166 (9th Cir. 1995); *United States* v. *Real Property Located in El Dorado County*, 59 F.3d 974, 982 (9th Cir. 1995). Thus, if the Eighth Amendment claim were to be litigated on the merits, the government would be entitled to probe the depth of petitioners' involvement in criminal activity, the full extent to which the subject properties were used in that activity, and issues such as "the intangible, subjective value of the property," and "the hardship" on the claimants. *El Dorado*, 59 F.3d at 985. The government would not be required to defend the Eighth Amendment claim solely on the allegations in its pleadings.

deprived of all benefit of its failure to produce the requested documents by delaying action on the motion to modify until the City complied with the discovery order. *Ibid.* That option did not exist in the instant case, where the delays caused by Portillo's willful discovery abuse worked to the government's prejudice. Cf. *Degen*, slip op. 6 (delay in forfeiture case "would be prejudicial to the Government, for if its forfeiture claims are good, its right to the properties is immediate"). Finally, in *Harris*, the Third Circuit recognized that a lesser relationship between the information being sought and the pleading dismissed as a sanction for nonproduction was appropriate where there was a "flagrant discovery violation" (47 F.3d at 1331), such as the failure to comply with discovery orders over an extended period, as occurred in *Curtis T. Bedwell & Sons, Inc.* v. *International Fidelity Ins. Co.*, 843 F.2d 683, 691-696 (3d Cir. 1988). Portillo's persistent disregard of the district court's orders for him to appear for the deposition in this case would clearly satisfy that Third Circuit's standard.

Finally, there is no conflict between the decision below and the cases petitioners cite (Pet. 14-15) requiring consideration of less drastic options before the sanction of dismissal may be imposed. The court below expressly recognized (Pet. App. 3a) "the availability of less drastic sanctions" as a factor it was required to consider, and, as petitioner recognizes (Pet. 14 n.6), the Ninth Circuit's published opinions require consideration of that factor as well. The court below simply concluded, in the face of Portillo's willful disobedience of the district court's discovery orders, that no sanction short of a default judgment would be sufficient in this case. There is no

warrant for Court to revisit that fact-bound conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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